Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-866

VORNADO, INC. t/a TWO GUYS, *et al.*,[1]

Appellants,

vs.

JOHN J. DEGNAN, ATTORNEY GENERAL OF NEW JERSEY, *et al.*,

Appellees.

On Appeal from the Supreme Court of New Jersey

MOTION TO DISMISS OR AFFIRM

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Appellee, Menswear Retailers of New Jersey, Inc., pursuant to Rule 16 of the Rules of the Supreme Court of

[1] Parties not shown in the caption are as follows: Gerald Vitiello, Joseph Hopmayer, Stuart Levine, Louis Mercado, Thomas G. Stramara, and Alan Ledden—Appellants; City of Hackensack, Town of Kearny, Menswear Retailers of New Jersey, Inc., Borough of Lodi, City of Garfield, Township of North Bergen and City of Vineland—Appellees.

the United States, moves to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of New Jersey on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to warrant further argument.

I.

The State Statute Involved and the Nature of the Case

A. The Statute

This appeal attacks the validity of the New Jersey "Sunday Closing Law" (Chapter 119 L. 1959; N.J.S. 2A: 171-5.8 through 5.18).

This statute interdicts the sale on Sunday, except as works of necessity or charity dissociated with the business of the participant, of clothing and wearing apparel, furniture, home furnishings, household appliances and building and lumber supplies. Adoption or repeal is left to county-wide referendum and, at present, the Act is effective in ten of the twenty-one New Jersey counties ("Closed Counties"). Violators are deemed disorderly persons and subject to fines graduated from $25 for the first to a maximum of $500 for the fourth and each subsequent offense or, in the discretion of the Court, imprisonment for up to six months.

B. The Proceedings Below

The Appellant, Vornado Inc. t/a "Two Guys" operates 27 discount department stores in the State of New Jersey, 20 of which are situate in Closed Counties. The individual Appellants are managers of Two Guys Stores and were named nominal parties plaintiff below.

On Sunday December 25, 1975 Vornado, in its stores in Closed Counties, exposed for sale and sold all manner of merchandise in violation of the Sunday Closing Law. That action resulted in prosecutions by the six Appellee municipalities.

Appellant asserts that the Sunday Closing Law infringes upon its right to due process and equal protection as secured by the Fourteenth Amendment. Specifically, it is contended that the statutory classifications of what may or may not be sold are devoid of rational nexus to a valid legislative goal, that the law is incapable of enforcement in other than a discriminatory and selective manner and that the categories of proscribed items are too vague to be understood by persons of ordinary intelligence.

Appellant instituted this action for a declaratory judgment that the Act was invalid under the New Jersey and Federal Constitutions and sought dismissal of prosecutions brought thereunder. Appellee, Menswear Retailers of New Jersey, Inc., was granted leave to intervene as a party defendant. On March 10, 1977 the Superior Court, Law Division issued an opinion declaring the law unconstitutional and permanently enjoining pending prosecutions. While pending on appeal to the Appellate Division the Supreme Court of New Jersey granted direct certification and, by decision handed down July 18, 1978, reversed the judgment of the Law Division and ordered the complaint dismissed. 77 N. J. 347 (1978) (A-2).

II.

ARGUMENT

The case presents no substantial question not previously determined by this Court.

The decision of the Supreme Court of New Jersey is plainly correct. Since *McGowan* v. *Maryland,* 366 U.S. 420 (1961), *Gallagher* v. *Crown Kosher Super Market,* 366 U.S. 617 (1961), and *Two Guys from Harrison-Allentown* v. *McGinley,* 366 U.S. 582 (1961) it has been well settled that a statutory discrimination affecting Sunday sales will not be set aside if any state of facts reasonably may be conceived to justify it or, unless the classification rests on grounds wholly irrelevant to the achievement of the State's objective.[2] The Supreme Court of New Jersey correctly applied these principles to the record below. In apparent recognition of this fact, Appellant now invites this Court to reconsider its position in *McGowan, Gallagher* and *Two Guys* in light of, among other things, "the changes in American society which have occurred since 1961" (J.S., p. 25). As the Court below properly ruled however, this is a proper subject for legislative rather than judicial inquiry. 77 N. J. 354 (A-2, 32a). See also: *Ferguson* v. *Skurpa,* 372 U.S. 726, 729 (1963).

Another question presented by Appellant is whether the classifications of the Sunday Closing Law are unconstitutionally vague; however, since the record is barren of any

[2] Appellant misstates the judicially determined purpose of the Act to be "keeping the highways clear and unobstructed so that citizens may find relief from the stress of everyday pursuits." (J.S., p. 9). Not so. The Supreme Court of New Jersey has expressly held otherwise. 77 N. J. 347, 355-356 (A-2, 32a).

proof regarding the character of the items the sale of which triggered the prosecutions in question, there exists no justiciable issue within the meaning of Article III of the Constitution. Consequently, the question is not ripe for consideration by this Court. *McGowan, supra,* 366 U.S. 428-429. Moreover, the courts below found this argument to be without basis in fact. (A-1, 20a; A-2, 41a).

Appellant finally contends that it is the victim of selective and discriminatory enforcement and seeks not to dismiss the pending prosecutions upon that ground, (see: *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886)), but to invalidate the statute itself—a proposition for which no authority is cited. This argument rests upon the contention that the statute is incapable of enforcement in other than a discriminatory and selective manner, a claim likewise found to be factually unsupportable by the courts below.

In light of the foregoing, it is manifest that previous decisions of this Court foreclose the arguments Appellant seeks to raise under the Federal Constitution and are conclusive as to the absence of a substantial Federal question. *Zucht* v. *King,* 260 U.S. 174 (1922), *Equitable Life Assurance Society* v. *Brown,* 187 U.S. 308, 311 (1902).

III.

CONCLUSION

WHEREFORE, Appellee, Menswear Retailers of New Jersey, Inc., respectfully submits that the question upon which this cause depends is so unsubstantial as not to need further argument, and Appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of New Jersey.

Respectfully submitted,

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